Supreme Court, U.S.
FILED
MAY 15 2002

No. 01-1515

In The
Supreme Court of the United States

CITY OF DETROIT, MICHIGAN, et al.,
Petitioners,
v.
LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a city ordinance subject to strict judicial scrutiny where it provides a preference in the competition for casino developments based upon whether the developer sufficiently supported a particular political issue in an election campaign?

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OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit are reported at 276 F.3d 876 (6th Cir. 2002) and 172 F.3d 397 (6th Cir. 1999) and are reproduced in Petitioner's appendix ("Pet. App.") at 1a-15a and 16a-43a, respectively.

The opinions of the District Court (Pet. App. 44a-89a, 90a-92a, 121a-122a, 123a-138a, 140a-141a) are unreported.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered its Judgment on January 11, 2002. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATEMENT

A. Introduction

The petition for certiorari fails to satisfy any of the classic criteria for the issuance of the writ. The decision below is not in conflict with opinions from any other federal court of appeals or state court of last resort. Nor, contrary to Petitioners' claims, does the decision contravene this Court's precedents. Finally, the proceedings in the lower courts are far from final. Serious remedial issues await resolution, and if Petitioners prevail below with respect to their arguments that Respondent is not entitled to any further equitable relief, the petition will have been rendered entirely unnecessary. Accordingly, the writ should be denied.

B. Factual Background

Respondent Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally-recognized Indian tribe located in Michigan's Upper Peninsula. Pet. App. 18a. Respondent has operated a casino gaming facility on its reservation since 1990, and early on became involved in efforts to bring casino gaming to the City of Detroit under the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), Pet. App. 18a. To this end, in 1994 Respondent secured nearly $175 million in financing for a proposed Detroit casino and resort operation. Pet. App. 252a. However, Governor Engler declined to support the idea of Indian gaming in Detroit, and under IGRA's terms the proposal died. Pet. App. 18a.

During the same time period, Petitioners Atwater Entertainment Associates, L.L.C. ("Atwater") and Greektown Casino, L.L.C. ("Greektown") initiated significant political efforts to legalize gaming in Detroit outside of the context of IGRA. Pet. App. 18a. As a first step, they secured sufficient signatures in 1994 to place on the municipal ballot two initiatives authorizing casino gaming in Detroit. *Id.* They then campaigned in support of the initiatives, expending considerable sums of money in the process, and succeeded at the municipal level when Detroit voters approved the initiatives in August of 1994. *Id.*

State law remained a barrier to Detroit gaming, so Atwater and Greektown then sponsored a state ballot proposal, known as Proposal E, to eliminate that obstacle. They again spent substantial sums of money in campaigning for the proposal, which the Michigan electorate approved on November 5, 1996. *Id.* The proposal was

codified as the Michigan Gaming Control and Revenue Act, Mich. Comp. Laws § 432.201 *et seq.* (the "Act"). Pet. 18a-19a. Respondent lent political support to neither the municipal initiatives nor Proposal E. Pet. App. 18a-19a.[1]

The Act authorizes gaming in cities satisfying three criteria (Detroit was then and remains today the only city satisfying those criteria). Pet. App. 19a. The Act further creates a Michigan Gaming Control Board ("the Board") and grants this entity the exclusive authority to issue state licenses necessary to operate gaming facilities. *Id.* The Act provides that the Board can license no more than three gaming facilities in any particular city and, as originally framed, required that the Board issue a license to any applicant that had initiated a casino gaming proposal in Detroit and succeeded in obtaining voter approval for it. Mich. Comp. Laws § 432.206(1)(b); Pet. App. 20a. Only Petitioners Atwater and Greektown qualified for this outright guarantee of a casino license. Pet. App. 20a. Subsequently, however, the Board, along with the State Attorney General and Governor, drafted amended legislation to remove the preference.[2] The State legislature passed the amendment by supermajority vote,

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[1] There appears to be a printing error in Petitioner's Appendix. What the Appendix numbers as footnote 3 of the Sixth Circuit's April 12, 1999 opinion is in fact footnote 1 of the published decision. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397, 409 n.1 (6th Cir. 1999) ("*Lac Vieux I*").

[2] In its Answer to the original Complaint, the Board admitted that the preference provisions violated the Michigan Constitution. Answer of Michigan Gaming Control Bd., *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, Case No. 2:97-cv-67, at ¶ 53 (W.D. Mich., April 28, 1997).

which Governor Engler then signed into law on July 17, 1997. Pet. App. 22a-23a. As interpreted by the Sixth Circuit, the amendment rendered the Act's original preference provisions "ineffective." Pet. App. 32a-33a, 37a.

In the meantime, however, the City of Detroit moved forward to enshrine the preferential treatment of Atwater and Greektown in its own regulatory scheme. To finalize the major shift in public policy represented by the advent of casino gaming within its boundaries, the City enacted on July 3, 1997 an ordinance entitled the "Casino Development Competitive Selection Process," which is now codified as amended at Detroit City Code § 18-13-1 *et seq.* (the "Ordinance"). As the Sixth Circuit aptly put it, "[i]n numerous respects, the ordinance rewards Atwater and Greektown for their efforts during the state and local referenda campaigns," Pet. App. 3a, and it does so in blatant fashion.

In its Statement of Intent, the Ordinance provides that "[i]n selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City . . . and who actively promoted and significantly supported the State initiative authorizing gaming." Pet. App. 169a; *see also* Pet. App. 21a. To translate the Statement of Intent into a binding reality, the Ordinance mandates that the entire process for selecting casino developers must be designed in such a way as not to "exclude those entitled to a preference [i.e., Atwater and

Greektown]." Pet. App. 173a; *see also* Pet. App. 39a n.4.[3] The Ordinance then provides that the Mayor *must* accord a preference in his selection of developers to any applicant if:

> (1) its proposal meets the criteria established by this Chapter and by the request for proposals;
>
> (2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and
>
> (3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

Detroit City Code § 18-13-6. It is an uncontested fact in this case that only Petitioners Atwater and Greektown could qualify for this preference. Pet. App. 22a; Pet. 6. Finally, the Ordinance provides that in approving the Mayor's selection of those who should ultimately receive licenses to game in Detroit, the City Council – *in the very first criterion listed for its consideration – "must be satisfied* . . . [t]hat the Mayor . . . applied the preference to those developers entitled to such preference pursuant to Section 18-13-6." Detroit City Code § 18-13-8 (emphasis added).

Thus, while Petitioners seek to minimize the significance of the preferences accorded Atwater and Greektown by the Ordinance, see Pet. 3, 6, the clear language and

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[3] What appears in Petitioners' Appendix as footnote 4 of the Sixth Circuit's April 12, 1999 opinion is in fact footnote 2 of the published decision. *See supra* note 1.

design of the Ordinance belie their claim: the preference infects the Ordinance throughout and taints the entire selection process. In the Sixth Circuit's words, "Detroit basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began." Pet. App. 7a. "Unsurprisingly," then, while eleven developers submitted applications for Detroit's casino licenses, two of the three ultimately selected were Petitioners Atwater and Greektown. Pet. App. 4a; Pet. App. 285a. Indeed, former Mayor Archer, while attempting to downplay the role that the preferences played in his selection decisions, has nevertheless been forced to admit in this litigation that he did in fact employ the preference in selecting Petitioner Greektown over other casino applicants. Pet. App. 285a.

In an effort to immunize its suspect Ordinance against challenge, the City required all who submitted proposals for casino development to waive their rights to challenge the Ordinance. *See Barden Detroit Casino LLC v. City of Detroit,* 59 F. Supp.2d 641 (E.D. Mich. 1999) (upholding validity of waiver), *aff'd on other grounds*, 230 F.3d 848 (6th Cir. 2000). Respondent, while "able and ready" to submit a casino bid, Pet. App. 26a-32a, 34a, refused to participate in the discriminatory scheme established by the Ordinance and thereby forsake its claim to a level playing field, but instead commenced this litigation.

C. Proceedings Below

On February 25, 1997, shortly after the passage of Proposal E and the enactment of the Michigan Act, Respondent filed suit challenging the scheme established

by the Act for legalizing gaming within the City of Detroit. The original defendants were the City, its Mayor, and its City Council members (all Petitioners before this Court), along with the Michigan Gaming Control Board and its members. Petitioners Atwater and Greektown, along with the Michigan Attorney General on behalf of the State, successfully intervened in the case in May of 1997. Pet. App. 20a. Respondent subsequently amended its complaint twice, in part to reflect the passage of the Ordinance and amendment of the Michigan Act. Pet. App. 23a-24a. As its complaint was ultimately framed, and as pertinent to the proceedings before this Court, Respondent claimed that the Ordinance ran afoul of the First Amendment by rewarding Atwater and Greektown for their political support for the Ordinance, and correspondingly punishing those who, like Respondent, had chosen not to speak out in the Ordinance's favor.

Each of the parties then filed cross-motions for summary judgment. On October 31, 1997, the district court granted defendants' motions and dismissed the action in its entirety. Pet. App. 44a-92a. The court held that Respondent lacked standing to press its First Amendment claim. Pet. App. 75a-76a. The court nevertheless went on to address the merits of that claim, and held that the facts presented did not implicate the First Amendment. Pet. App. 76a-80a.

On April 12, 1999, the Sixth Circuit reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) (*"Lac Vieux I"*). Pet. App. 16a-43a. The Court of Appeals first held that Respondent had established that it had standing to press forward with its claims. The court found that Respondent had satisfactorily established that

the Ordinance had caused it an injury in fact – under the principles enunciated by this Court in *Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), Respondent had met its burden of showing that it had been "able and ready" to submit a casino bid, but that it had declined to do so in the face of the Ordinance's preferences. *Lac Vieux I*, 172 F.3d at 403-407. Pet. App. 26a-32a, 34a. Moreover, the court found that in the specific context of Respondent's First Amendment claim, a facial challenge to the Ordinance was appropriate:

> [T]he ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue.

Lac Vieux I, 172 F.3d at 407-408; Pet. App. 35a. Accordingly, under the principles enunciated by this Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the court concluded that "the fact that Lac Vieux did not actually participate in the competitive bidding process is not an obstacle to establishing standing." *Lac Vieux I*, 172 F.3d at 408; Pet. App. 36a.

With respect to the merits, the Sixth Circuit had little difficulty reversing the district court's conclusion that this case does not implicate the First Amendment:

> The ordinance grants benefits and imposes burdens according to whether an individual or entity

> sufficiently supported a particular political issue . . . [It] thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). It does not matter that the ordinance involves prior rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

Lac Vieux I, 172 F.3d at 409; Pet. App. 39a. The court then went on to hold that, because the Ordinance favors or burdens speech according to its content, it is subject to strict scrutiny review. *Lac Vieux I*, 172 F.3d at 409-410; Pet. App. 40a. It remanded the case to the district court in order to provide the City with an opportunity to establish that the Ordinance is "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Id.*

On remand, Respondent moved the district court for a preliminary injunction to prevent the City from taking any further steps towards implementing the provisions of the Ordinance. At that time, Petitioners Atwater and Greektown had been working towards opening temporary casinos – facilities that would operate while promised $1.8 billion permanent casino facilities, which are still yet to be built, were being constructed. Pet. 9. On December 2, 1999, the district court denied the motion. Pet. App. 93a-121a. It held that, in light of the Sixth Circuit's opinion, Respondent had demonstrated a strong likelihood of success on the merits of its claims. Pet. App. 101a. However, it found that, because of the sizeable number of

jobs and significant amount of tax revenues the casinos were expected to generate, the harm to the City and the public from the issuance of an injunction would outweigh the hardship to Respondent from its denial. Pet. App. 110a-119a. "Prevention of the Ordinance's chilling effect on future political speech," the court stated, "would be more effectively accomplished through a declaratory judgment than by suspending the opening of the casinos." Pet. App. 105a.

The parties then cross-moved for summary judgment once more. In an opinion dated July 14, 2000, the district court granted Petitioners' motions (the other defendants having been dismissed out of the case by this point) and again dismissed the action in its entirety. Pet. App. 121a-139a. The court held that the Ordinance passed muster under strict scrutiny review. The court found that the City had a compelling interest in "maintaining a sound tax system and maintaining political stability" as well as a "compelling interest in revitalizing [its] economy through casino gaming and in maintaining strong public support for casino gaming in Detroit." Pet. App. 134a-138a. The court further found that the City had chosen the least restrictive means to further that interest because there was a more restrictive means available to it. Pet. App. 7a, 138a.

The Sixth Circuit again reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir. 2002) ("*Lac Vieux II*"); Pet. App. 1a-15a. The Court of Appeals first decreed that its prior decision that the Ordinance was subject to strict scrutiny review was the law of the case. *Lac Vieux II*, 276 F.3d at 879; Pet. App. 5a. It then held that while it agreed that the City's interest in promoting

the stability of its political and tax systems is a compelling state interest, it did not understand how the Ordinance's preferences were necessary to the achievement of that end. "Absent the [preferences], we are confident that Detroit's interests could be served without intruding upon the Lac Vieux's First Amendment Rights." *Lac Vieux II*, 276 F.3d at 880; Pet. App. 7a. The court remanded the case to the district court for further proceedings. In doing so, it provided no suggestion as to what it thought an appropriate remedy might be for the constitutional violation it had identified. Judge O'Malley (sitting by designation from the Northern District of Ohio) dissented. *Lac Vieux II*, 276 F.3d at 880-883; Pet. App. at 8a-15a.

On February 7, 2002, the district court entered a declaration that, in light of the Sixth Circuit's second opinion, "the Ordinance in its current form is unconstitutional." Pet. App. 141a. Respondent then moved for further relief, asking the district court to enjoin the renewal or extension of existing casino development agreements and casino licenses pending the City's conduct of a new casino developer selection process for the permanent casino developments, as the currently selected developers have not yet begun construction of permanent facilities.[4] In vigorously opposing this request, Petitioners have contended that the district court's declaration adequately cures the constitutional violation, and that the district

[4] Unless extended or replaced, the existing development agreements will expire on June 15, 2002. Under the Michigan Gaming Control and Revenue Act, a development agreement serves as a prerequisite to eligibility for a casino license. Mich. Comp. Laws § 432.206(1)(b). The Gaming Control Board has a statutory obligation to appoint a conservator to operate the existing temporary casinos if a new selection process is undertaken. Mich. Comp. Laws § 432.224(1).

court should conclude, as it did two years ago, that the issuance of further equitable relief is unwarranted. The district court held a hearing regarding remedial issues on May 1, 2002 and has given the parties until May 23, 2002 to submit further briefing and evidence.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Has Created No Conflict in Authority By Its Decisions.

Petitioners do not press any argument that the Court of Appeals, through either of its opinions in this case, has brought itself into conflict with a decision from a sister court of appeals or a state court of last resort. This alone constitutes compelling reason to deny the writ.

In her dissent below, Judge O'Malley suggested that, by deeming the Ordinance subject to strict scrutiny review, the Court of Appeals had put itself "at odds" with the decisions of the Third Circuit in *McClintock v. Eichelberger*, 169 F.3d 812 (3rd Cir. 1999), and of the Eleventh Circuit in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc). *Lac Vieux II*, 276 F.3d at 880; Pet. App. 14a. However, the dissent's suggestion ignores critical differences between the factual context of those decisions and the facts here, differences that undermine any suggestion of a true conflict.

This Court has long held that the government "has interests as an employer in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563,

568 (1968) (emphasis added). Because of "'the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees,'" *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering*, 391 U.S. at 568), the Court has accorded the government "wide discretion and control over the management of its personnel and internal affairs." *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.)). Accordingly, employees' claims of First Amendment injury do not give rise to strict scrutiny of the government's actions, even where those actions are based on the content or viewpoint inherent in the employees' speech, but instead are measured – in what has come to be known as the *Pickering* balancing test – against a "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150.

In *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996), this Court extended the deference shown the government as an employer to those situations where the government, instead of carrying out selected public services through its own employees, uses an independent contractor to perform those services instead. In *Umbehr*, the county in question was obliged under state law to provide for the disposal of solid waste generated within its borders, and hired the plaintiff as an independent contractor to serve as its trash hauler. *Id.* at 670-671. In determining the level of scrutiny applicable to a First Amendment claim subsequently brought by the contractor, this Court deemed "[t]he similarities between government employees and government contractors with respect to this issue . . . obvious. The government needs to be free to terminate both

employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption." *Id.* at 673-674. Hence, the Court concluded that the government's "interests *as a public service provider*, including its interest in being free from intensive judicial supervision of its daily management functions," *id.* at 678 (emphasis added), mandate application of the *Pickering* balancing test whether the government administers those public services through its own employees or through outside contractors.

However, in *Umbehr*, as in the government employee cases that came before it, the Court stressed that the First Amendment deference shown to the government as a provider of public services does not extend to the government when it is acting as a sovereign:

> We have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." . . . Umbehr is correct that if the Board had exercised sovereign power against him in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest.

Umbehr, 518 U.S. at 676, 678 (quoting *Waters v. Churchill*, 511 U.S. 661, 673, 675 (1994) (plurality opinion)); *see also Waters*, 511 U.S. at 671, 675 (*"[T]he government as*

employer indeed has far broader powers than does the government as sovereign . . . . The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.") (plurality opinion) (emphasis added).

The two decisions cited by the dissent below as allegedly giving rise to a Circuit split are governed squarely by the doctrine of *Pickering* and *Umbehr,* for they do not involve the government acting as sovereign. *Shahar* was a government employee case. The Eleventh Circuit reviewed deferentially a decision by the Attorney General of Georgia to revoke an offer of employment made to a prospective staff attorney. In doing so, it stressed the narrow factual context underpinning its decision:

> In reviewing Shahar's claim, we stress that this case is about the government acting as employer.
>
> * * *
>
> This case is about the powers of government as an employer, powers which are far broader than government's powers as sovereign. In addition, the employment in this case is of a special kind: employment involving access to the employer's confidences, acting as the employer's spokesperson, and helping to make policy. This kind of employment is one in which the employer's interest has been given especially great weight in the past.

Shahar, 114 F.3d at 1102, 1110 (en banc).[5] *McClintock*, meanwhile, was a governmental contractor case. There, the Third Circuit's concern was specifically limited to "the First Amendment's impact on the awarding of a governmental contract" for the performance of governmental surveys. *McClintock*, 169 F.3d at 813-814.

As such, neither case stands in conflict with the decisions of the Court of Appeals below. Here, the City was most decidedly acting as a sovereign, rather than as an employer or contractor for governmental services. It is obvious that, through the Ordinance, the City was not proposing to enter into an employment relationship with prospective casino developers. It is likewise obvious that, through the Ordinance, the City was not proposing to enter into contracts with prospective developers for the provision of governmental services. Even the most avid supporters of casino gaming would not describe that industry as falling anywhere within the "range of public works and . . . delivery of governmental services." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 719-720 (1996). Rather, casino operators, like other regulated businesses, provide goods and services to the consumer public under terms and conditions prescribed by the government as a sovereign. The Court of Appeals simply held that, in prescribing those terms and conditions, the government may not favor or burden prospective bidders for casino developments based on the content of their speech, unless the government's actions satisfy strict

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[5] *Halstead v. Motorcycle Safety Foundation*, 71 F. Supp.2d 464 (E.D. Pa. 1999), a district court case also cited by the dissent below, is likewise a government employment case. "[Plaintiff's] complaint is that he was not offered a job by a prospective employer." *Id.* at 474.

scrutiny. Nothing in the decisions cited by the dissent below intimates that the Third or Eleventh Circuits would come to a different conclusion.

In sum, the suggestion by the dissent below of a conflict in Circuit authority rests on the facile assumption that the principles of *Pickering* and *Umbehr* apply here. That assumption – nowhere explained – ignores the distinction repeatedly drawn by this Court between the First Amendment analysis applicable to the government acting as sovereign and the analysis applicable to the government when it acts as a provider of public services. With that distinction properly in mind, it is apparent that no conflict in authority exists, and the writ should be denied.

B. The Court of Appeals' Decisions Do Not Contravene This Court's Precedents.

The above discussion dispenses with Petitioners' principal argument in support of the writ: that a "direct conflict" exists between the decisions below and this Court's decisions in *Umbehr* and its companion case, *O'Hare*. Pet. 12. That argument, like the argument of the dissent below, simply assumes that the City here was contracting out governmental services like the county in *Umbehr*. As discussed above, it was not, but was instead establishing a licensing scheme much like the government does for other highly controlled industries. Because the City here was acting in a sovereign capacity, Petitioners' argument of a direct conflict with *Umbehr* ring hollow and provide no basis for issuance of the writ.

C. The Writ Should Not Issue to Prevent the Development of the Law in the Courts of Appeals.

Petitioners also argue that this Court should issue the writ because of "[t]he danger that other circuits may follow *Lac Vieux II*'s lead" and apply strict scrutiny to laws of the sort at issue here. Pet. 13-14, 20. This argument displays a fundamental misapprehension of the limited nature of this Court's certiorari jurisdiction. This Court is not in the business, of course, of reaching out at the first available opportunity to correct perceived errors committed by the Courts of Appeals. Instead, this Court typically allows the law to develop in the courts below, and waits for a conflict in authority to emerge before committing its precious resources to the resolution of any particular issue. Whatever one may think of the merits of the Court of Appeals' decisions here – and this is not the place to argue those merits – those decisions do not stand in conflict with opinions from any sister courts of appeals or state courts of last resort. Accordingly, the writ should be denied.

D. The Proceedings Below Are Far From Final.

Review is also unwarranted at this time because, in its most recent decision, the Court of Appeals remanded the case to the district court for further proceedings. *Lac Vieux II*, 276 F.3d at 880; Pet. App. 8a. This lack of finality is, by itself, a sufficient reason to deny the petition. *See Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.") (per curiam); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari)

(denial of writ appropriate given that remedial issues awaited resolution by the courts below).

On remand from the Court of Appeals, the district court entered a declaration that the Ordinance in its present form violates the First Amendment, Pet. App. 140a-141a, and Petitioners have no quarrel with that declaration.[6] The district court then invited briefing from the parties on the question whether any further relief should issue. Pet. App. 142a-144a. In responding to that invitation, Petitioners have vigorously pressed the following arguments: (1) the Court of Appeals did not decide or even presage what the district court should do in terms of equitable relief; (2) the issuance of the declaratory judgment cures the First Amendment violation and ensures that the City will not do the same thing again; (3) the district court's 1999 decision that a balancing of the harms precludes any injunctive relief that would disrupt the operation of the casinos also applies now, such that the district court should simply leave the present casino operators in place; and (4) the offending provisions of the Ordinance are, in any event, severable.[7] While Respondent

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[6] *See, e.g.,* Intervening Defendant Atwater Entertainment Associates, L.L.C.'s Response to Plaintiff's Motion for Further Relief, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.,* Case No. 2:97-cv-67 (W.D. Mich., April 10, 2002) ("No one is arguing that the Detroit City Council should, or could, enact another preferential casino selection ordinance after being put on notice of the current ordinance's constitutional flaws.").

[7] *See, e.g.,* Brief of the City of Detroit Defendants In Opposition to Plaintiff's Motion for Further Relief, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.,* Case No. 2:97-cv-67 (W.D. Mich., April 10, 2002), at 3, 5, 7, 11, 15, 19, 20, 24; Intervening Defendant Atwater Entertainment Associates, L.L.C.'s Response to Plaintiff's Motion for Further Relief (April 10, 2002), at

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obviously disagrees with these contentions, there is simply no way of predicting at present what the district court will do. The court held a three-hour hearing on the question of remedy on May 1 and has kept the record open for further submissions through May 23, 2002. Whatever the district court decides, an appeal will almost undoubtedly follow.

If Petitioners prevail in their remedial arguments before the district court, Respondent will be denied any meaningful equitable relief, and the possibility exists that any such decision will be sustained by the Court of Appeals. If so, resolution of the questions presented by the petition will have been rendered unnecessary. Once again, then, expenditure of this Court's precious resources on this matter is unwarranted. The writ should not issue.

1-2, 8, 15, 20, 28, 30; Defendant-Intervenor Greektown Casino, L.L.C.'s Memorandum of Law In Opposition to Plaintiff's Motion for Further Relief (April 10, 2002), at 3, 9, 10, 23, 26-27, 38.

CONCLUSION

The petition for a writ of certiorari should be denied.

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